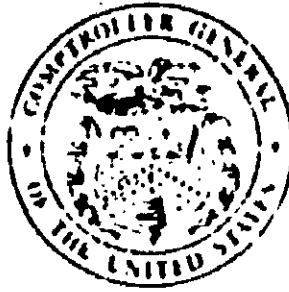


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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202017.2

DATE: December 11, 1981

MATTER OF: Heuer, Inc.

DIGEST:

1. Agency cancellation of invitation for bids after bid opening is reasonable where award is to be made on basis of extended unit prices for estimated quantities and an estimated quantity is found to be grossly erroneous.
2. There is no requirement that contracting agency refrain from ex parte meeting with protester during pendency of GAO protest, so long as all interested parties are given notice of protest and opportunity to submit views.

Heuer, Inc. (Heuer), protests the Department of the Army, Corps of Engineers' (Corps) decision to cancel invitation for bids DACW51-80-B-0028 after bid opening, because a Government estimate was found to be grossly in error. The Corps determined that all bidders were potentially prejudiced and that the Government could not be assured of receiving the lowest price. Heuer contends that the accuracy of the estimate is not important. We agree with the Corps' position and, consequently, we have denied the protest.

The solicitation invited bids for the construction of the Elizabeth River Flood Control Project, Upstream Area, Elizabeth, New Jersey. The project includes channel improvements, construction of concrete walls, raising roads and bridges, building pump houses and landscaping. There are three separate price schedules, a Federal Schedule, a non-Federal Schedule I, and a non-Federal Schedule II. The two non-Federal Schedules contain items which the city of Elizabeth, New Jersey and Union County, New Jersey are responsible for funding in

accordance with agreements executed under the authority of 33 U.S.C. § 701h (1976). All schedules list separate bid items, with estimated quantities for each item. Bidders were required to supply unit and total prices for each item. Award was to be made made to the bidder offering the low bid for the Federal Schedule.

The following bids were received:

<u>BIDDERS</u>	<u>TOTAL OF FEDERAL SCHEDULE ITEMS</u>
Heuer, Inc.	\$25,246,282
Servidone Construction Co.	\$25,432,497
Hess Brothers, Inc.	\$27,843,752
Slattery Associates, Inc.	\$33,923,355
S.J. Groves & Sons Corp.	\$30,360,030
The Conduit & Foundation Corp.	\$38,424,436
Schiavone Construction Co.	
Government Estimate	\$26,981,692

Item 6, "Excavation, Common" and item 7, "Excavation, Rock" of the Federal Schedule are relevant to the protest. Excavation is described generally in the technical provisions of the solicitation as removal of material in preparing foundations, and from ditches and channels. Rock excavation is defined essentially as removal of solid rock, large boulders, or other material which cannot be removed by common excavation methods without continuous and systematic blasting. The solicitation estimated that there would be 191,800 cubic yards of common excavation, and 44,400 cubic yards of rock excavation. These estimates were based on analysis of drill holes, auger holes, and geophysical surveys, conducted over a period from 1963 to 1980.

The following prices were bid on items 6 and 7:

<u>BIDDER</u>	<u>EXCAVATION, COMMON</u> unit price/est. am't	<u>EXCAVATION, ROCK</u> unit price/est. am't
Heuer	\$7.00/\$1,342,600	\$.01/\$444
Servidone	\$10.00/\$1,918,000	\$10.00/\$444,000
Hess	\$12.25/\$2,349,500	\$.01/\$444
Slattery	\$20.00/\$3,836,000	\$40.00/\$1,776,000
Groves	\$20.00/\$3,386,000	\$20.00/\$888,000
C. & F. and Schiavone Construction	\$16.60/3,183.8800	\$65.00/\$2,886,000
Government Estimate	\$7.80/\$1,496,040.00	\$27.30/\$1,212,120.00

Servidone Construction Corporation (Servidone) protested any award to Heuer, to the New York District of the Corps and to the General Accounting Office (GAO) on the bases that Heuer would be unable to perform the work, and that Heuer's bid was unbalanced. In responding to the protest, the New York District reviewed the estimate for rock excavation, and found it to be accurate. The contracting officer also found that Heuer's bid was not unbalanced. While its unit price for rock excavation appeared to be too low, there was no apparent inflation of any other unit price. Additionally, based on its finding that the estimate for rock excavation was accurate, the Corps concluded that Heuer's bid would result in the lowest price.

Servidone, however, continued its protest, and an ex parte meeting with the North Atlantic Division of the Corps was held. Servidone apparently raised the issue of the accuracy of the estimate for rock excavation at that meeting. The estimate was reviewed again by the New York District, and this time it was found to be in error. According to the Corps, the error occurred in the following way.

After completion of the field work, the soil and rock samples were classified and the data transmitted

to a standard drawing. In 1975, the data on the drawing was used to develop a profile of types and amounts of required excavation. The total amount of rock excavation was calculated to be 44,400 cubic yards. The rock was mostly stratified red shale, which can be removed without systematic blasting. At that time, the Corps decided that the solicitation for the project should contain separate items for earth (common) and rock excavation due to the higher cost of rock excavation. However, the solicitation was not prepared until several years later. When it was prepared, the definition of rock excavation requiring systematic blasting was inadvertently included. That definition is inconsistent with the type of rock excavation predicted by the samples. So, while the solicitation estimate that 44,400 cubic yards of rock requiring systematic blasting is present, the soil samples show that no rock of that nature is likely to be encountered. In effect, no item 7 work is anticipated, and item 6 work is increased by 44,400 cubic yards.

The Corps determined that the solicitation was fatally flawed and should be canceled, and the requirement resolicited with a definition of rock excavation that accurately reflects the nature of the rock predicted by the geological field work. According to the Corps, since bids were based on grossly incorrect estimates, there is no way of knowing whether the Government is getting the lowest price for the work that it really needs. In fact, if the bids are evaluated using the revised estimates, no item 7 work and 44,400 more item 6 work, Heuer's bid would be increased by \$310,356 while Servidone's bid would not change. Heuer would then no longer be the low bidder on the Federal Schedule. Additionally, bidders were prejudiced because they may have bid very differently if the correct estimates had been in the solicitation.

Essentially, Heuer's argument is that excavation estimates based on boring samples are inherently unreliable and, therefore, the estimate here is as good or as bad as any such estimate. Heuer argues that there is no way of knowing what quantity of rock, as defined in the solicitation, will be

encountered until the project is completed. As evidence of this, Heuer points to a project completed nearby on the upstream side of this project. The estimate for rock excavation (using the same definition) for that project was 1,230 cubic yards, and, in fact, 1,399 cubic yards of rock were finally excavated. According to Heuer this shows that such estimates are inaccurate, and that rock as defined in the solicitation is likely to be present on the site of this project.

Heuer also contends that, even if the estimate is incorrect, no bidder gained an advantage because all apparently accepted the estimate at face value. Additionally, no bidder can be harmed by a variation in the actual amount of rock encountered because all will be paid for the total amount on a unit price basis.

Heuer admits that if no rock is present, evaluation of the estimated rock excavation at Heuer's unit price for common excavation (\$7 instead of \$0.01) would result in Heuer's bid not being low for the Federal Schedule. However, its bid it would still be low for all three schedules totaled. Heuer contends that, even though the solicitation provides for award to the low bidder on the Federal Schedule, the solicitation language that award will be made to the bidder whose bid is most advantageous "price and other factors considered," permits consideration of the non-Federal Schedules.

Finally, Heuer objects to the Corps ex parte contact with Servidone during the pendency of Servidone's GAO bid protest.

It appears that Heuer has misunderstood the reasons for estimated quantities in solicitations like these, and the impact on bid preparation and evaluation that inaccurate estimates can have. Our decision in Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164, enunciates the rules to be applied in these situations and the reasons for those rules. Heuer argues that Friel is inapplicable here because it involves unbalanced bidding, and the Corps has determined that Heuer's

bid is not unbalanced. The principles discussed in Friel are clearly relevant to the question of the effect of inaccurate estimated quantities on bid evaluation, whether or not unbalanced bidding calls those estimates into question.

Generally, a solicitation may be canceled after bids have been opened only if there is a compelling reason to do so. One such reason is the existence of inadequate or ambiguous specifications in the solicitation. Defense Acquisition Regulation § 2-404.1(b)(1) (Defense Acquisition Circular 76-17, Sept. 1, 1978). As we recognized in Friel, not all instances of inadequate or ambiguous specifications justify canceling a solicitation after bid opening. However, a defect in the estimated quantity of work is generally sufficient justification for canceling. This is because there are no actual requirements on which to evaluate bids, so estimated requirements reflect the agency's best judgment as to what may transpire in the future and what ultimate costs the Government may incur. Thus, the estimated quantities directly control bid prices and bid evaluation.

Where there is a substantial variation between the IFB estimates and the actual estimated requirements, there is substantial doubt that award to any bidder will result in the lowest cost to the Government. Additionally, award to the apparent low bidder determined by using the actual estimates, is not fair because bidders might have changed pricing strategies based on different estimates and may have offered different bid prices. Also, other potential bidders may well have bid, based on different requirements.

Here, the Corps has provided a detailed and reasonable explanation of how the error in the rock excavation estimate occurred, and of the significant magnitude of the error. Heuer does not seem to dispute the Corps' explanation, other than to argue that such estimates are always unreliable and that rock was found in the upstream project. These arguments are unpersuasive. The estimates are based on a recognized method of predicting subsurface conditions, and, in fact, the evidence presented by Heuer concerning the nearby upstream project and by the

Corps concerning a nearby downstream project, undercut Heuer's arguments. Rock excavation of approximately 10 percent of total excavation was estimated for this upstream project, and that turned out to be the case. At Heuer's request the Corps provided information on rock encountered on a nearby downstream project. Very little rock was estimated for that project, and none was encountered. The estimates in those cases were very good predictors of the actual quantities. The fact that some rock was predicted and found on one side of this project, does not support the conclusion that rock will be encountered on this project when balanced by the results of the project on the other side.

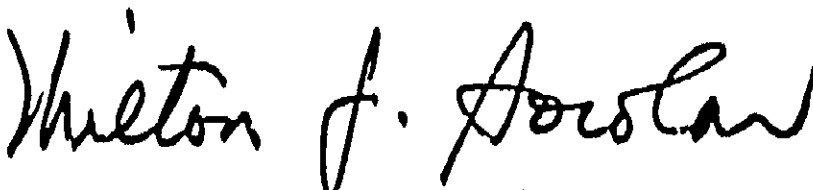
Also, as we pointed out in Friel, estimates should represent the agency's best information as to its actual requirements, and are critical to bid preparation and evaluation. To argue, as Heuer does, that a gross variation between the agency's best information as to its needs and the estimate in the solicitation should be ignored because such estimates are always unreliable is untenable.

Given the substantial variation between the IFB estimate and the Corps actual estimated needs, we agree that an award under the defective solicitation or by using the revised estimates to determine the low bidder would result in doubt as to whether the Government was getting the lowest price. As Heuer admits, it would no longer be the low bidder on the Federal Schedule, and, notwithstanding its strained interpretation of the solicitation, award is clearly required to be made to the low bidder on the Federal Schedule. In any event, an award to the low bidder, whether on the Federal Schedule or all three schedules, as determined by applying the revised estimate would be unfair to all bidders as it would amount to the use of an evaluation formula different from that set forth in the IFB.

Regarding Heuer's concern over the Corps' ex parte meeting with Servidone during the pendency of Servidone's protest, our policy prohibits ex parte contacts between GAO and the parties to a bid protest, but does not extend to ex parte contacts among the

parties. Also, while DAR § 2-407.8 (1976) provides that when a protest is filed the contracting officer shall give notice to all interested or affected parties, it does not require that all parties be present at meetings concerning the protest. Heuer was given notice of the protest.

Protest denied.

for 
Comptroller General
of the United States